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AUTHOR Haas, Shaun
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ABSTRACT

This information memorandum of the Wisconsin Legislative Council describes 1987 Wisconsin Act 332, relating to crimes and civil offenses against children and providing penalties. An introduction describes how Act 332 will reorganize existing crimes against children into a separate chapter of the Criminal Code and will revise crimes and offenses against children contained in statutes outside the Criminal Code. Ten principal features of Act 322 are listed which relate to: (1) clarifying and strengthening the crime of physical child abuse; (2) recognizing the crime of causing mental harm; (3) clarifying child victim age categories in the sexual assault statute; (4) prohibiting possession of child pornography; (5) clarifying statutes relating to incest, child enticement, and sex organ exposure; (6) revising the crime of exposing a child to harmful material; (7) clarifying statutes relating to child abandonment, abduction, custody interference, and contributing to the delinquency or neglect of a child; (8) creating new crimes relating to possession of dangerous weapons on school premises and delivering controlled substances near school grounds; (9) creating an extended statute of limitations for certain crimes; and (10) decriminalizing several regulatory offenses to promote enforcement. Part I of the memorandum gives the background of the legislation. Part II describes major provisions of Act 332. The penalty classification system in the Criminal Code is appended. (NB)

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NEW LAW RELATING TO CRIMES AGAINST CHILDREN

(1987 WISCONSIN ACT 332)

INFORMATION MEMORANDUM 88-2

CG 020925

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April 29, 1988

Madison, Wisconsin

Wisconsin Legislative Council Staff
April 29, 1988

By: Shaun Haas
Senior Staff Attorney

Information Memorandum 88-2

NEW LAW RELATING TO CRIMES AGAINST CHILDREN (1987 WISCONSIN ACT 332)

INTRODUCTION

This Information Memorandum describes 1987 Wisconsin Act 332, relating to crimes and civil offenses against children and providing penalties. The Act, which takes effect on July 1, 1989, reorganizes existing crimes against children, currently located throughout the Criminal Code [chs. 939 to 948], into a separate chapter of the Criminal Code--chapter 948. Crimes and offenses against children contained in statutes outside the Criminal Code are also revised by the Act.

Principal features of Act 332 include:

1. Clarifying and strengthening the crime of physical child abuse by creating a range of penalties, depending on the nature of the offender's actions and the amount of harm inflicted, and penalizing the failure of certain responsible persons to take action to prevent physical harm to a child.

2. Specifically recognizing the crime of causing mental harm to a child and penalizing certain responsible persons for failing to take action to prevent mental harm to a child.

3. Clarifying the child victim age categories in the sexual assault statute and creating a provision that penalizes certain responsible persons for failing to take action to protect the child from sexual assault by others.

4. Prohibiting the possession of child pornography and revising the current statute on sexual exploitation of children to make enforcement easier.

5. Clarifying and strengthening current statutes relating to incest, child enticement and sex organ exposure.

6. Revising the crime of exposing a child to harmful material to make enforcement easier and to substitute the standards for determining whether or not material is obscene, which have been recognized by the U.S. Supreme Court, for the defective standards in the current statute.

7. Clarifying and strengthening the current statutes relating to child abandonment, abduction, custody interference and contributing to the delinquency or neglect of a child.

8. Creating new crimes relating to the possession of a dangerous weapon on school premises and the delivery of controlled substances near school grounds.

9. Creating an extended statute of limitations for criminal actions involving victims of the crimes of incest, child abuse, sexual assault, sexual exploitation of a child and solicitation of a child for prostitution and for civil actions for injuries arising out of incest.

10. Decriminalizing several regulatory offenses (such as employment regulations relating to minors and restrictions on the use of lead-bearing paints) to promote the enforcement of these offenses.

Copies of Act 332 may be obtained from the Documents Room, Basement Rotunda, State Capitol, Madison, Wisconsin 53702; telephone (608) 266-2400.

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PART I

BACKGROUND

The legislation which became Act 332 (1987 Senate Bill 203) was developed by the Legislative Council's 1986-87 Special Committee on Crimes Against Children. The members of the Special Committee were: Senators Barbara L. Ulichny, Chairperson, and David Helbach; Representatives Marlin D. Schneider, Vice-Chairperson, John C. Schober, Secretary, Thomas M. Barrett, Jeannette Bell, DuWayne Johnsrud, Sue Rohan Magnuson and Gary J. Schmidt; and Public Members Ruth A. Bachman, Robert C. Crawford, Ronni Jones, Judge Daniel R. Moeser, Sally Meyer Ruf, Virginia Schrag, Chief Allen L. Spencer and James Ward.

The Special Committee was directed to examine state laws relating to crimes against children to:

1. Evaluate whether it is advisable to reorganize these laws into a separate chapter of the statutes; and

2. Review these laws to address any major policy issues relating to crimes against children.

The Special Committee was assisted in its review of these offenses by a preliminary draft proposal, entitled Crimes Against Children: A Proposed Draft of Wisconsin Statutes, dated July 1985. The draft proposal was the product of a two-year reorganization project undertaken by Attorney Ronni J. Jones, under the supervision of a University of Wisconsin Law School/Extension faculty advisory committee. The Law School proposal was used as a resource document by the Special Committee in developing it recommendations.

In preparing its recommendations for revisions in offenses involving children as victims, the Special Committee's general objectives were to:

1. Clarify existing statutory language;

2. Incorporate recent appellate and Supreme Court decisions;

3. Revise penalties to reflect the actual or potential harm to children resulting from criminal conduct; and

4. Develop new prohibitions directed at wrongful conduct against children which is inadequately addressed under current law.

After reaching an agreement on its recommendations for substantive statutory changes, the Special Committee decided to recommend consolidation of the statutes located in the Criminal Code, relating to crimes against children, into a separate chapter of the Code [ch. 948]. The Special Committee concluded that a separate chapter accomplishes the objectives of:

1. Emphasizing the seriousness of offenses against the most vulnerable crime victims in our society;

2. Making the crimes against children easier to locate; and

3. Resulting, in practice, in a more consistent pattern of charging decisions among prosecutors throughout the state.

The Special Committee also recommended changes in various offenses against children which are primarily regulatory offenses, but did not recommend the incorporation of these offenses into the Criminal Code.

PART II

MAJOR PROVISIONS OF 1987 WISCONSIN ACT 332

A. CHILD ABUSE

1. Physical and Mental Abuse

Act 332 revises the current child abuse statute to apply to any victim under 18 years of age, rather than the current age category of "under 16 years of age." The Act recognizes several types of abusive conduct.

a. Causation of bodily harm to a child. Under the Act, penalties for child abuse resulting in bodily harm to a child vary depending on the nature of the offender's actions, the degree of harm inflicted and the relationship of the offender to the child:

(1) Intentional causation of harm to a child. Intentional causation of great bodily harm to a child is a Class C felony.* Intentional causation of bodily harm to a child is a Class D felony.

(2) Reckless causation of bodily harm to a child. Reckless conduct which causes great bodily harm to a child is a Class D felony. Reckless conduct which causes bodily harm to a child is a Class E felony. The causation of bodily harm to a child by reckless conduct which creates a high probability of great bodily harm is a Class D felony.

Reckless conduct is defined in the Act as "...conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child."

(3) Penalty enhancer. If a parent or other "person responsible for a child's welfare," as defined in the Act, intentionally or recklessly causes bodily harm or great bodily harm to a child, the sentencing judge is authorized to increase the maximum term of imprisonment for the offense by five years.

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*NOTE: See Chart 1 on page 19 in the Appendix for the felony penalties referenced in this Information Memorandum.

b. Causation of mental harm to a child. Under the Act, whoever is exercising temporary or permanent control of a child and causes mental harm to the child by conduct which demonstrates substantial disregard for the mental well-being of the child is guilty of a Class C felony. The definition of "mental harm," which is created in the Act, is similar to the definition of "emotional damage" contained in the abused or neglected children reporting law [current s. 48.981, Stats.].

The creation of the crime of causing mental harm to a child recognizes that the current child abuse statute has been interpreted by the State Court of Appeals to apply to nonphysical abuse [State v. Campbell, 102 Wis. 2d 243, 306 N.W. 2d 272 (Ct. App. 1981)].

c. Exposure of a child to the risk of physical or mental abuse. The Act subjects parents and other "person[s] responsible for the child's welfare," as defined in the Act, to criminal liability for failing to act to prevent physical or mental abuse to the child.

Under these provisions of the Act, a parent or other responsible person is guilty of either a Class C or D felony, depending on the type and magnitude of injury exposure, if the person is aware of possible physical or mental abuse to a child and, although physically and emotionally capable of doing so, fails to take action to prevent the abuse and the failure to act either: (1) exposes the child to an unreasonable risk that the abuse will occur; or (2) facilitates the actual occurrence of the abuse.

A Class C felony is committed whenever the failure to take action exposes the child to an unreasonable risk of great bodily harm or mental harm or facilitates the actual occurrence of great bodily harm or mental harm. A Class D felony is committed whenever the failure to take action exposes the child to an unreasonable risk of bodily harm or facilitates the actual occurrence of bodily harm.

The failure-to-act provisions codify the interpretation of the current child abuse statute by the State Supreme Court in State v. Williquette, 129 Wis. 2d 239, 385 N.W. 2d 145 (1986). The State Supreme Court in Williquette determined that a violation of the child abuse statute may occur where a parent knowingly exposes a child to a foreseeable risk of abuse or fails to act to prevent abuse.

2. Child Abuse Examinations

In conjunction with the revision of the crime of child abuse, Act 332 repeals s. 972.16, Stats., relating to commitment of a person convicted of child abuse for a presentence social and psychological examination. These

persons continue to be subject to the presentence investigation and report authorized under s. 972.15, Stats., for all defendants.

3. Discipline of Children

Act 332 revises the current statute recognizing a privilege to discipline children as a defense to the crime of child abuse, as well as other crimes against children. As revised, the privilege may be claimed when the act is committed as reasonable discipline of the child by the child's parent or certain other persons who are legally responsible for the child's welfare, as defined in the Act.

The Act specifies that:

a. "Reasonable discipline" includes only such force as a reasonable person believes is necessary; and

b. It is never reasonable discipline to use force intended to cause great bodily harm or death or which would create an unreasonable risk of great bodily harm or death to a child.

4. Defense Based on Treatment by Spiritual Means

Act 332 recognizes a defense to the crime of physical child abuse where the allegedly abusive or otherwise unlawful conduct involves treatment for healing by spiritual means through prayer. Currently, the legitimacy of religious means of treatment, such as advocated by practitioners of Christian Science, is recognized in other statutes.

B. SEXUAL OFFENSES

1. Sexual Assault

Act 332 revises provisions of the sexual assault statute relating to child victims of assault to clarify the age categories of victims to which these provisions apply. Specifically, the Act restates the maximum age for first-degree sexual assault, where consent is not an issue, to apply to victims "who have not attained the age of 13 years." The current age category is "12 years of age or younger."

The Act also deletes the minimum age for second-degree sexual assault (currently 12 years of age) so that an offender who has sexual intercourse or sexual contact with a child who has not attained the age of 12 years can be charged with either first- or second-degree sexual assault. This

change is intended to afford the district attorney greater flexibility in his or her charging decision.

First-degree sexual assault is punishable as a Class B felony; second-degree sexual assault is punishable as a Class C felony.

The Act creates a new provision in the sexual assault statute that recognizes that a "person responsible for the child's welfare," as defined in the Act, has a duty to protect that child from sexual assault by others.

Under this provision, a parent or other responsible person is guilty of a Class C felony if that person is aware of a possible assault on the child and, although physically and emotionally capable of doing so, fails to take action to prevent the assault and the failure to act either: (a) exposes the child to an unreasonable risk that the assault will occur; or (b) facilitates the assault that does occur.

2. Sexual Exploitation

Under the current sexual exploitation of children statute, it is a Class C felony to be involved in the production or distribution of child pornography. However, mere possession, without intent to sell or distribute, is not a violation. Under Act 332, the possession of a film, photograph, videotape or other pictorial reproduction of the child engaged in "sexually explicit conduct" (i.e., child pornography) is a Class E felony.

Except in the case of the new crime of possession, the Act deletes the "knowledge of the age of the child" element of the crime of sexual exploitation of a child. However, the Act recognizes that "reasonable cause to believe that the child had attained the age of 18 years" is an affirmative defense, which the defendant has the burden of raising and proving by a preponderance of the evidence.

3. Incest

The current incest statute prohibits marriage or acts of sexual intercourse only between persons related by blood nearer in degree than second cousins, regardless of age. Act 332 expands the incest statute to include, where child victims are involved: (a) relation by adoption, in addition to relation by blood; and (b) sexual contact, in addition to sexual intercourse. Incest is punishable as a Class C felony.

The Act also creates a "failure-to-act" provision which subjects a "person responsible for the child's welfare," as defined in the Act, to criminal liability for failing to act to prevent an act of incest.

Under this provision, a parent or other responsible person is guilty of a Class C felony if he or she is aware of a possible act of incest with the child and, although physically and emotionally capable of doing so, fails to take action to prevent it and the failure to act either: (a) exposes the child to an unreasonable risk of sexual intercourse or contact; or (b) facilitates the sexual intercourse or contact that does occur.

4. Enticement

Under the current child enticement statute, which is punishable as a Class C felony, there are two elements to the crime: (a) the enticement of a minor under age 18 into a vehicle, room or secluded place; and (b) the intent to commit a crime against sexual morality. The terms "enticement" and "crime against sexual morality" are not defined in the statutes, but have been construed by Wisconsin appellate courts.

Rather than relying solely on present court construction, Act 332 deletes the current statutory language which refers to "intent to commit a crime against sexual morality" and substitutes the following specific list of intended unlawful purposes:

a. Having sexual contact, including sexual intercourse, with the child;

b. Causing the child to engage in prostitution;

c. Exposing a sex organ to a child or causing the child to expose a sex organ for purposes of sexual arousal or gratification;

d. Taking sexually explicit pictures of the child;

e. Causing bodily harm or mental harm to the child; or

f. Giving or selling to the child a controlled substance.

In revising the child enticement statute, the Act also removes the age limitation applicable to offenders under current law. This present age limitation provides that only persons 18 years of age or older may be charged with and convicted of enticing a child. Under the Act, juveniles (persons under age 18) may be found delinquent by the court under the

Children's Code [ch. 48, Stats.] or waived into criminal court and prosecuted as adults for the commission of the crime of child enticement.

5. Sexual Intercourse

Act 332 combines current statutory provisions prohibiting fornication (involving vulvar penetration) and sexual gratification (involving other types of sexual intercourse) with a 16- or 17-year old into a single statutory provision relating to sexual intercourse involving a child age 16 or 17. This offense is punishable as a Class A misdemeanor* under both the Act and current statutes.

6. Sex Organ Exposure

Act 332 creates a new crime prohibiting a person from exposing a sex organ to a child, or causing a child to expose a sex organ, for the purpose of sexual arousal or gratification.

Unlike the current lewd and lascivious behavior statute [s. 944.20, Stats.], which is unaffected by the Act, there is no requirement under the new statute that the act be done publicly or indecently. The new crime is punishable as a Class A misdemeanor, which is the same penalty applicable currently to the crime of lewd and lascivious behavior.

C. ADULT RESPONSIBILITIES

1. Harmful Material Exposure

Act 332 revises the current crime of exposing minors to harmful materials by creating two penalty levels for the crime:

a. A Class E felony to transfer harmful material to a child; and

b. A Class A misdemeanor to possess material which is harmful to children, with the intent of transferring the material to a child.

Under current law, it is a Class A misdemeanor to transfer harmful material to a child, but it is not a crime to possess harmful material with intent to transfer the material to a child.

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*NOTE: See Chart 2 on page 19 in the Appendix for the misdemeanor penalties referenced in this Information Memorandum.

The Act substitutes a new criterion for determining whether the material is harmful to children. Under the Act, material is harmful to children if, among other things, it lacks serious literary, artistic, political, scientific or educational value for children, when taken as a whole. This standard is consistent with the language suggested by the U.S. Supreme Court in Miller v. California, 413 U.S. 15 (1973), for determining whether material is obscene.

The Act incorporates language from the current crime comics statute [s. 947.08, Stats.], which is repealed by the Act. This language adds "physical torture or brutality" to the current language describing the types of conduct depicted in material which may be harmful to children.

The Act also repeals the requirement under the current statute for obtaining a civil declaratory judgment, regarding the harmful nature of specific material, prior to a criminal action for exposing minors to harmful materials. Under the Act, a criminal action may be brought immediately against a person who has transferred to a child material alleged to be harmful to a child. The issue of whether the material in question is harmful becomes an element of the offense to be proven by the prosecution during the criminal trial.

Consistent with the repeal of civil declaratory judgment procedures applicable to the crime of exposing a child to harmful materials, the Act repeals a provision of a statute regulating the exhibition of explicit sexual material at outdoor theaters. The provision repealed by the Act permits the Attorney General or a district attorney to bring a civil action to declare explicit sexual material at outdoor theaters harmful to minors.

2. Abandonment

Act 332 makes the abandonment of a child statute applicable to all children, rather than applicable only to children under the age of six years, as under current law. Child abandonment is punishable as a Class D felony.

3. Failure to Support

Act 332 specifies that a defendant, who raises an affirmative defense to a failure to support violation, has the burden of proving the defense by a preponderance of the evidence.

4. Concealing Death of a Child

Currently, a "woman" is prohibited from concealing the corpse of any issue of her body with intent to prevent a determination of whether it was born dead or alive. Act 332 expands this prohibition against concealing the death of a child to apply to any person. This crime is punishable as a Class E felony.

5. Unauthorized Placement for Adoption

Act 332 increases the penalty for the crime of unauthorized placement of a child for adoption from a Class E felony to a Class D felony.

6. Contributing to Delinquency or Neglect

For purposes of clarity, Act 332 separates the crime of contributing to delinquency of a child from the crime of contributing to the neglect of a child (both offenses are covered under the current statute).

Act 332 revises the penalties in the current statute to:

a. Impose a higher penalty if the delinquent act contributed to would have been a felony if the child were an adult (Class D felony, rather than a Class A misdemeanor); and

b. Increase the current penalty where death is a result of contributing to the neglect or delinquency of a child (Class D felony increased to a Class C felony).

The Act expressly states that a parent or other "person responsible for the child's welfare," as defined in the Act, may contribute to the neglect or delinquency of the child by his or her failure to take action, as well as by his or her actions.

7. Dangerous Weapon Possession and Transfer

Act 332 expands the scope of the current prohibition against the possession of a pistol by or transfer of a pistol to a child, which is punishable as a Class A misdemeanor, to apply to certain other dangerous weapons, in addition to pistols (e.g., martial arts weapons). Several exceptions contained in the current statute are retained and new exceptions are recognized in the Act.

Also, the Act creates a new crime which prohibits any person from knowingly possessing or going armed with a dangerous weapon, including any firearm and certain specified martial arts weapons, on school premises. The first violation of this prohibition is punishable as a Class A misdemeanor; a second or subsequent violation within a five-year period is punishable as a Class E felony.

A number of exceptions to the new prohibition are contained in the Act. These exceptions permit the possession or use of dangerous weapons on school premises for school-sanctioned purposes (e.g., instructional courses in the use of a weapon) and other appropriate purposes, including authorized hunting on school premises.

8. Receiving Stolen Property

Act 332 increases the penalty, from a Class E felony to a Class D felony, for the receipt of stolen property from a child where the property is valued at more than $500, but not more than $2,500.

The Act also creates a provision establishing that proof of certain specific facts relating to the value of the property and lack of consent to delivery of the property by the person responsible for a child's welfare is prima facie evidence of a violation.

9. Controlled Substance Distribution

Under Act 332, a person who delivers any controlled substance near school premises to a person who is under 18 years of age or at least three years younger than the defendant is subject to the same penalty enhancement provision that is currently applicable to the delivery of cocaine near a school building. The enhancement provision permits the court to increase an offender's prison term by up to five years.

D. ABDUCTION AND CUSTODY

1. Abduction

Under the current abduction statute, the prosecution is required to prove that the person taking or detaining a child is doing so for an immoral purpose. Act 332 deletes the requirement of proof of an immoral purpose and requires proof only that the defendant had an unlawful purpose.

The current statute applies to any person who abducts a child, including a parent who abducts his or her children. The Act specifies that the abduction prohibition applies only to a person who abducts a child who is not his or her own child by birth or adoption. This limitation recognizes that there are specific custody interference statutory provisions which more appropriately deal with a parent who takes or conceals his or her child from the other parent or other legal custodian of the child.

The Act also creates two levels of penalties for abduction, based on whether force or threat of imminent force is an element of the crime. If force or threat of imminent force is an element, the offense is a Class B felony; if not, the offense is a Class C felony, the same penalty level as the current abduction statute.

2. Custody Interference

Act 332 makes the following changes in the interfering with custody statute:

a. Makes all offenses specified in the statute applicable to any child victim under 18 years of age. Under current law, some offenses apply only to children under the age of 14.

b. Eliminates the requirement under several provisions in the current statute that the child must be taken or enticed outside of the state before a custody interference violation can occur.

c. Recognizes an additional defense to criminal liability for a custody interference violation for a parent who takes a child in order to protect the child from sexual assault. Currently, and under the Act, the parent is permitted to take the child in order to protect the child from "imminent physical harm."

d. Creates a provision permitting the court to order a person convicted of a custody interference offense to reimburse any expenses incurred by the other parent or any state or local government agency in locating and returning a child who was unlawfully taken or concealed. Current law does not specify who is to pay these expenses.

E. REGULATORY OFFENSES

In order to promote enforcement, Act 332 decriminalizes several regulatory offenses and subjects these offenses to a civil forfeiture penalty not to exceed $1,000:

1. First violations of employment regulations relating to minors [ss. 103.29 (1) and (2), 103.30, 103.31 and 103.82 (1) (a) and (3)];

2. Violations of requirements relating to the prevention of infant blindness [s. 146.01 (3)]; and

3. Violations of restrictions on the use of lead-bearing paints [s. 151.13 (2)].

The Act also establishes a civil penalty of a forfeiture not to exceed $1,000 for an intentional violation of the prohibition against public school pupil discrimination [s. 118.13 (4)]. The current statute does not contain a specific penalty for a violation.

F. EXTENDED STATUTE OF LIMITATIONS PERIOD

1. Extended Statute of Limitations for Certain Criminal Actions

The current general criminal statute of limitations provides that prosecutions for felonies must be commenced within six years and prosecutions for misdemeanors within three years of the illegal conduct. Act 332 creates an extended statute of limitations for the following crimes: incest involving child victims; physical child abuse; causing mental harm to a child; sexual assault of a child; sexual exploitation of a child; and solicitation of a child for prostitution. Under the Act, criminal prosecution must be brought within six years after the alleged offense or by the time the victim reaches the age of 21, whichever period is longer.

2. Extended Statute of Limitations for Certain Civil Actions

Act 332 clarifies the time limit for the commencement of a civil action for damages for injury caused by incest. The Act specifies that a civil action based on incest must be brought within two years of the date the victim discovers the injury and its cause or with reasonable diligence should have discovered the injury and its cause, whichever occurs first.

The provision is consistent with the holding of the State Court of Appeals regarding the accrual date for a cause of action for incestuous abuse [Hammer v. Hammer, 142 Wis. 2d 257, 418 N.W. 2d 23 (Ct. App. 1987)]. The provision recognizes that incest victims, although they may be competent at the time the incest occurs, may repress their experience and become aware of their injuries at a later time.

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APPENDIX

PENALTY CLASSIFICATION SYSTEM IN CRIMINAL CODE

PENALTY CLASSIFICATION SYSTEM IN CRIMINAL CODE

The crimes against children listed in the new Criminal Code chapter created by Act 332 [ch. 948] are subject to the felony and misdemeanor penalty classification system which is applicable to all Criminal Code crimes, pursuant to ss. 939.50 and 939.51, Stats. For convenient reference, the following charts may be consulted to determine the maximum penalties applicable to the various offenses described in Part II of the Information Memorandum.

CHART 1

CRIMINAL CODE FELONY PENALTIES

Classification	Maximum Penalty
Class A	Life imprisonment
Class B	Imprisonment not to exceed 20 years
Class C	Fine not to exceed $10,000, imprisonment not to exceed 10 years, or both
Class D	Fine not to exceed $10,000, imprisonment not to exceed 5 years, or both
Class E	Fine not to exceed $10,000, imprisonment not to exceed 2 years, or both

CHART 2

CRIMINAL CODE MISDEMEANOR PENALTIES

Classification	Maximum Penalty
Class A	Fine not to exceed $10,000, imprisonment not to exceed 9 months, or both
Class B	Fine not to exceed $1,000, imprisonment not to exceed, 90 days, or both
Class C	Fine not to exceed $500, imprisonment not to exceed 30 days, or both